

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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MARVIN CHARLES GABRION, II,

Movant,

v.

File No. 1:15-CV-447

UNITED STATES OF AMERICA,

Respondent.

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Hearing re: Movant's Motion for Discovery

Before

THE HONORABLE ROBERT HOLMES BELL  
United States District Judge  
March 9, 2016

APPEARANCES

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U.S. District Court Reporter

Grand Rapids, Michigan

March 9, 2016

3:27 p.m.

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P R O C E E D I N G S

THE COURT: You may be seated. Good afternoon.

ALL COUNSEL: Good afternoon, Your Honor.

THE COURT: This is the matter of Gabrion v. United States. My long-suffering court reporter who has been with me for some 30-some years told me as we were coming in here that it's been almost 14 years to the day that we were last here in this courtroom on this subject matter, so here we are.

Ms. Foster is here, Mr. Graham is here, and Mr. Cleary's here. Is that right?

MR. GRAHAM: Good afternoon, Your Honor.

THE COURT: Ms. Foster, you will be the primary spokesperson?

MS. FOSTER: Yes, Your Honor.

THE COURT: Okay. And Ms. McManus, you are the primary spokesperson?

MS. McMANUS: Yes, Your Honor.

THE COURT: And Mr. VerHey will be sitting at your arm to correct you. And Ms. Berens, you're to keep these two

1 in line; is that right?

2 MS. BERENS: That's my job, yes, Your Honor. Thank  
3 you.

4 THE COURT: All right. All right.

5 The issue, I think, is -- there are several issues:  
6 whether Gabrion has presented any claim that requires  
7 evidentiary development, whether the good cause requirement is  
8 present to authorize a party to conduct discovery on this  
9 United States Code 2255 under Rule 6. And I believe this, Ms.  
10 Foster, is your motion to conduct discovery in the form of  
11 interrogatories, requests for production of documents,  
12 requests to admit, and certain requests for limited  
13 depositions. Is that correct?

14 MS. FOSTER: Yes, Your Honor.

15 THE COURT: Okay. You may come to the podium and be  
16 heard.

17 MS. FOSTER: First, Your Honor, I would like to  
18 thank the Court for entertaining us this afternoon. I know  
19 that this Court has many matters on its docket and we  
20 certainly appreciate the time that you're spending with us  
21 this afternoon.

22 What we seek is an orderly and efficient process by  
23 which to vindicate Mr. Gabrion's substantial federal claims.  
24 What we're asking the Court for is six months to conduct  
25 discovery and 21 days after the close of discovery to amend

1 the petition. We believe that that will provide the most  
2 efficient and fair way to conclude this matter. The  
3 government opposes discovery, depositions, and time to amend  
4 the petition.

5 At the outset I want to make it clear to the Court  
6 that we're not trying to circumvent the rules. We understand  
7 that the rules for amendment do not permit completely new  
8 claims, and that's not what we're trying to do. We understand  
9 that claims can be filed at this point only if they relate  
10 back to the originally filed petition.

11 Expediency, though, must be tempered with fairness.  
12 We did file the petition in a timely manner, and our duty as  
13 counsel, as laid out in our motion for discovery, our duty as  
14 counsel in this 2255 proceeding is essentially to  
15 reinvestigate what has come before. The 2255 rules and our  
16 obligations as counsel means that we need to start from junk.  
17 We start as if nothing had been done and we investigate the  
18 client and we investigate the case.

19 That is not to say that what has been done is  
20 irrelevant. It most assuredly is not. But it adds to what we  
21 have to do and doesn't subtract. We're required to question  
22 whether the strategic decisions made by counsel were based  
23 upon sound policy and an accurate assessment of the facts.  
24 Were the proper experts utilized? Were they provided the  
25 proper and necessary information to reach reliable opinions?

1 Did the government witnesses tell the truth? If not, what  
2 are the potential reasons for that failure? Is there more to  
3 the story than was presented at trial? Was the jury  
4 improperly impacted by extraneous information?

5 All of these are things that we must look into as  
6 2255 counsel, and we have taken that duty and obligation  
7 seriously. Our file currently is large. It's -- I stopped  
8 counting when our file reached 100,000 pages. In many ways  
9 our task is larger than -- much larger, in fact, than even  
10 trial counsel.

11 When we got this case, we started reviewing the  
12 transcript. We met with our client. We reviewed the direct  
13 appeal records. We secured and reviewed trial counsel's files  
14 and many of the expert files. We interviewed trial counsel,  
15 direct appeal counsel, the mitigation investigator, the fact  
16 investigator, and a plethora of the witnesses called and not  
17 called at trial. We consulted our own experts.

18 As I'm sure this Court is aware, our client is  
19 difficult, to say the least. That has certainly not changed  
20 in the 14 years since you were last in this court with him.  
21 That puts additional strain on counsel. We see him regularly.  
22 Generally we try to see him twice a month. Either Mr. Cleary  
23 or I will travel to the United States Penitentiary at Terre  
24 Haute which is in our district to visit in person with him.  
25 Someone from our office speaks with him every single day.

1           It took the government nine months to respond to the  
2 petition, and I am not suggesting that they did not require  
3 that nine months. I'm sure, I'm certain that they did. But  
4 this was in spite of the fact that the government counsel was  
5 both trial counsel and direct appeal counsel. All three of  
6 the 2255 lawyers assigned on behalf of Mr. Gabrion are new to  
7 this case, and so everything was new.

8           Our prep time at this point is shorter than it took  
9 the trial lawyers to prepare for trial, and it's most  
10 assuredly infinitely shorter than the 13 years that the case  
11 was on direct appeal. Again, I don't mean to suggest that  
12 that time was not necessary and required. In fact, I think  
13 that it stands as testament to the fact that the Sixth Circuit  
14 took its obligations in this case very seriously.

15           Finally, this is not our only case. Mr. Graham is  
16 in private practice. Mr. Cleary and I, I'm the Chief Federal  
17 Defender for the Southern District of Indiana. Mr. Cleary is  
18 one of my assistants. We obviously have other cases. In  
19 addition to that, we have another death penalty case in spite  
20 of the fact that our office is very small. We have 5.5  
21 lawyers. I'm the .5 because I'm required to do administrative  
22 work as well.

23           Contrary to the government's contention that this  
24 case can be resolved via summary judgment, I think that Mr.  
25 Gabrion presents very significant issues that should cause

1 this Court pause. I was interested in reading an article by  
2 a district court judge, Judge Bennett. I don't know if you're  
3 acquainted with him.

4 THE COURT: Oh, I am. I am.

5 MS. FOSTER: Okay. He wrote an article that I  
6 thought was interesting from the judge's perspective about how  
7 the judge appoints counsel and believes that he has appointed  
8 counsel that is carrying out their obligations under the  
9 Constitution and under all available guidelines, but that  
10 sometimes what happens is when you look underneath, that all  
11 the judge sees is the tip of the iceberg and that underneath  
12 there's serious things that should cause the Court pause. I  
13 believe that this is that case.

14 The defense mental health presentation fell well  
15 short of the prevailing professional norms of reasonably  
16 competent counsel. The defense called an expert that they  
17 have admitted to the government and to us when we interviewed  
18 that they were surprised when their own expert testified that  
19 Mr. Gabrion was not mentally ill. They abandoned an expert  
20 who had treated Mr. Gabrion prior to the offense and would  
21 have testified that he was treated with -- it was either  
22 lithium or a lithium substitute. That has relevance because  
23 Mr. Gabrion responding well to that treatment is a clear  
24 indication that Mr. Gabrion suffers from bipolar disorder. In  
25 fact, that is a method that medical professionals use to

1 diagnose bipolar disorder.

2 Trial counsel wholly failed to conduct a full social  
3 history investigation. Their social history was nine pages  
4 long. This is our social history as it currently stands. It  
5 is a hundred and -- I'm sorry, 81 pages, single-spaced. It is  
6 supported by 5,500 pages of documents relating to medical  
7 records, criminal records that support the factual statements  
8 that are contained in our social history. Clearly all of that  
9 would have been crucially important in a case where the  
10 government argued very effectively that Mr. Gabrion was  
11 malingering mental illness.

12 THE COURT: Tell me, is he being treated now?

13 MS. FOSTER: No. In the Bureau of Prisons, no.

14 THE COURT: Why not?

15 MS. FOSTER: I'm trying to think of how I can say  
16 this diplomatically.

17 THE COURT: Don't you have habeas abilities?

18 MS. FOSTER: I'm sorry?

19 THE COURT: Don't you have habeas abilities to go to  
20 court in southern Indiana on this issue?

21 MS. FOSTER: To see that he's treated?

22 THE COURT: Right.

23 MS. FOSTER: I suppose I might.

24 THE COURT: So you're arguing that he is -- he was  
25 untreated then and he is untreated now?



1 MS. FOSTER: That is correct, and that he was  
2 mentally ill then and he is mentally ill now and that his  
3 mental illness has not abated in the past 13 or 14 years. In  
4 fact, it has been consistent, and we'll have witnesses to that  
5 effect.

6 THE COURT: That makes your argument harder, though,  
7 doesn't it?

8 MS. FOSTER: No, sir.

9 THE COURT: Because had he been treated and was he  
10 doing fine now, you --

11 MS. FOSTER: I'm sorry, this was before trial.  
12 Before trial he was taking a lithium -- not before trial.  
13 This was before the crime occurred when he was on the  
14 streets. There was a doctor on the street that the defense  
15 consulted that they abandoned. That doctor was treating him  
16 with lithium or a lithium substitute. I can't -- it was  
17 Depakote, so it was a lithium substitute, and he responded to  
18 it, but he didn't want to take it.

19 THE COURT: So?

20 MS. FOSTER: So he is mentally ill, and people with  
21 mental illness frequently don't want to take their  
22 medication. I think that the importance of that piece of  
23 information is that it is a piece of information that shows  
24 that Mr. Gabrion had mental illness at the time that this  
25 crime was committed that persists to this day.

1 THE COURT: A totally separate issue from the  
2 sanity-insanity question.

3 MS. FOSTER: I'm not sure that I would say it's a  
4 totally separate question. I'm also not sure that I would say  
5 that because he has mental illness, that that necessarily  
6 rendered him insane.

7 THE COURT: Right.

8 MS. FOSTER: Yes.

9 THE COURT: Right.

10 MS. FOSTER: Correct.

11 THE COURT: You answered my question correctly.

12 MS. FOSTER: Okay. Our social history contains an  
13 extraordinary, extraordinary amount of mental -- major mental  
14 illness in Mr. Gabrion's family. I've been practicing law for  
15 33 years and I've never seen anything like this.

16 Why is that relevant? That makes a difference  
17 because, as we know from psychiatric literature and the DSM-5  
18 itself, having just one relative with major mental illness  
19 increases the person's likelihood of also having major mental  
20 illness ten times. This social history is chock full of major  
21 mental illness in Mr. Gabrion's immediate family that resulted  
22 in criminal interventions, that resulted in inpatient  
23 treatments, inpatient commitments by courts, you name it.

24 The --

25 THE COURT: Did you get to the part where the mother

1 beat the father and broke his bones and the father broke the  
2 mother's bones?

3 MS. FOSTER: I'm sorry, please?

4 THE COURT: Did you get to the part where his father  
5 broke his mother's bones and his mother broke his father's  
6 bones?

7 MS. FOSTER: I know that there was a lot of  
8 dysfunction and abuse in that family, yes.

9 THE COURT: Yeah.

10 MS. FOSTER: Probably or perhaps due in major part  
11 to the mental illness that runs rampant through that family.

12 The trial counsel also failed to document the  
13 plethora of head injuries, and many of these head injuries are  
14 contained in some of the documentation that we have gotten,  
15 black ink on a white page. At trial counsel focused on two,  
16 maybe three head injuries, and the government very effectively  
17 was able to contest that. In fact, I think that we have  
18 documented ten or eleven separate head injuries, many of which  
19 are documented by records.

20 Another important piece of evidence in this case  
21 that I think should cause the Court concern is that trial  
22 counsel allowed argument and evidence that Mr. Gabrion  
23 manipulated the timing of the state rape case. The Court will  
24 recall that the government's theory with regard to motive in  
25 this case was that Mr. Gabrion was at the time of the homicide

1 charged with rape in state court where Ms. Timmerman was the  
2 victim and Mr. Gabrion was the alleged assailant. In that  
3 case -- in the federal case, the government quite effectively  
4 argued that Mr. Gabrion manipulated the timing of the rape  
5 case, and that having manipulated the timing of that, that he  
6 manipulated it in order to wait for Ms. Timmerman to be  
7 released from jail; having manipulated the timing of that case  
8 and Ms. Timmerman eventually being released from jail, that he  
9 then killed her.

10 But the manipulation aspect of the government's case  
11 simply is not true. And that was an important piece because  
12 it went to the statutory aggravator of premeditation and  
13 planning, and it also went to the statutory -- or  
14 non-statutory aggravator of obstruction of justice. It  
15 painted Mr. Gabrion as sinister and evil and cunning.

16 What we have discovered, however, is that -- and we  
17 discovered this from both grand jury testimony that was in  
18 counsel's file from one of the trial judges that was on the  
19 rape case wherein that judge testified that indeed he did not  
20 believe that Mr. Gabrion had manipulated the process, and we  
21 also simply pulled the docket of the rape case. And you'll  
22 recall that Ms. Roach, the -- she was a SAUSA in this case  
23 until she was removed by the Department of Justice for  
24 misconduct in this case, and what the government then did is  
25 they replaced her, took her off from being an assistant, but

1 made her a witness.

2 She testified about a number of things to support  
3 this manipulation of the state rape case theory of the  
4 government, and one of the things that she testified to is  
5 that in all cases, in every case, every state rape case, that  
6 she would try and have a preliminary hearing. That was  
7 important because it fed into the government's manipulation  
8 theory. We've pulled the docket sheets for I think four years  
9 of state rape cases in Newaygo County and we can find maybe --  
10 zero, is that right? Zero where a preliminary hearing was  
11 held at the state's request. All of that was available to  
12 defense counsel, but none of it was used.

13 Another important piece of evidence at trial were  
14 the letters written by Rachel Timmerman to her father, to the  
15 prosecutor and the judge in the state rape case. At trial the  
16 government forcefully argued that Mr. Gabrion wrote those  
17 letters or forced Ms. Timmerman to write them. Again, this  
18 was a very effective strategy on behalf of the government in  
19 putting forth the claim that Mr. Gabrion premeditated,  
20 preplanned, that he was cunning, that he was sinister. In  
21 fact, in counsel's file in the discovery in this case was the  
22 report of the FBI forensic agents who looked at those letters  
23 and compared them to writings of Mr. Gabrion and concluded in  
24 fact that it was likely that Mr. Gabrion neither wrote nor  
25 dictated those letters and that Ms. Timmerman was not under

1 duress at the time that she wrote them. All of these facts  
2 and more should give this Court pause with regard to this  
3 case.

4 The government contends that discovery could --  
5 should be denied because we're on a fishing expedition. The  
6 cases that are cited by the government at their submission on  
7 Page 4, if one looks at those cases, they don't support the  
8 government's position. So the Lynott case, for example, isn't  
9 a 2255 at all, but it's a 2241 from a parole revocation. In  
10 the Cornell case that's cited by the government, the defendant  
11 got discovery with regard to a dirty cop, and the client in  
12 that case was pro se. Finally, in United States v. Black,  
13 that was truly a fishing expedition because this again was a  
14 pro se client who had not even filed a petition. There was no  
15 petition filed when the petitioner in that case sought  
16 discovery. That was the true definition of a fishing  
17 expedition.

18 With regard to the depositions that we have  
19 requested, what we are requesting is the opportunity for both  
20 sides to question a limited number of witnesses. We believe  
21 that we're entitled to a hearing. If we get -- we've not  
22 filed a request for a hearing at this point, but we would  
23 expect that we would file that at such time as the amendment  
24 is filed.

25 Depositions in this cases would streamline courtroom

1 proceedings. They would make the presentation of the  
2 witnesses go more quickly, be more relevant. There would be  
3 less fumbling. We may determine from these depositions that  
4 these particular witnesses aren't even needed, and so we would  
5 be able to take what may have been a 65-witness hearing and  
6 narrow it down to 20. We might be able to read stipulations  
7 with the government so that we don't have to bring people in,  
8 all of which I think that the deposition request truly would  
9 streamline.

10 And it's not -- it's not a windfall to one side or  
11 the other. I would think that in the event that Your Honor  
12 issues an order for a hearing, the government's going to want  
13 to depose many of these people. Stebbins and Mitchell were  
14 obviously counsel. Judge Yates was the defender at the time.  
15 It appears that he represented a number of the witnesses, the  
16 government witnesses in this case. We're not even sure at  
17 this point the full scope of that. There's discovery that  
18 we've requested with regard to that.

19 Mr. Crates was the mitigation investigator. Ms.  
20 Hubbard was the fact investigator. Chrystal Roach was the  
21 SAUSA for a time in this case and then was a witness that we  
22 contend misrepresented -- that her testimony contained  
23 numerous and critical misrepresentations. Sue Adams and Chris  
24 Whitcomb are the forensic examiners that did the examination  
25 for the government of the letters that I talked about earlier

1 where the examiners concluded that Mr. Gabrion neither wrote  
2 nor dictated those letters.

3 We would withdraw the request to depose Mr.  
4 Scharre. We would also withdraw the request to depose Mr.  
5 Chamberlain.

6 Many of the other witnesses that we've listed there  
7 are doctors that worked on this case. Dr. Jackson was the  
8 defense expert who testified that Mr. Gabrion was not mentally  
9 ill, and trial counsel has told us and the government that  
10 that was a surprise to them. Dr. Griesemer, Ryan and Saathoff  
11 were government experts. As you can see from our discovery  
12 requests, there are questions with regard to what information  
13 they had at their disposal when they reached their opinions.  
14 That is a big piece of why we want to depose them. Stephen  
15 Cohle was the pathologist, the government's pathologist. The  
16 pathology here was and continues to be important in this case.

17 Lance Workman was the police officer. The Court  
18 will recall that there was testimony from two police officers  
19 that when they -- that Mr. Gabrion at one time -- this was  
20 admitted during the penalty phase as part of the future  
21 dangerousness presentation. The Court will recall that there  
22 were police officers that were investigating Mr. Gabrion's  
23 alleged shooting a firearm in a neighborhood, that they  
24 confronted Mr. Gabrion outside his residence, that they then  
25 went inside the residence to retrieve the gun that they



1 believed he was using to do the shooting, and that upon  
2 reaching the second floor, they saw on the bed a nude doll and  
3 a bullfrog in -- that contained bodily fluids.

4 Mr. Workman is important because, again, that  
5 testimony made Mr. -- it was admitted as part of the future  
6 dangerousness argument, and it obviously made Mr. Gabrion seem  
7 evil. I'll leave it at that. Mr. Workman, however, when he  
8 wrote his police report, the incident with the bullfrog is not  
9 contained in the police report. The government provided a  
10 roadmap, if you will, to counsel prior to trial listing all of  
11 their witnesses and their anticipated testimony, and with  
12 regard to Mr. Workman there was no reference with regard to  
13 the bullfrog.

14 Richard Miller is the lead detective in the case.  
15 Again, I think that if we could take these depositions, as the  
16 Court is fond of saying to the jury when the jury goes in the  
17 back and we're out here in trial talking about, you know, this  
18 or that instruction or whatever, I don't know if it's this  
19 Court's general procedure, but I know in Indianapolis the  
20 judges are very careful to tell the jury while you're back  
21 there, we're working. And of course that is true, and I think  
22 that the same holds true with depositions, Your Honor. I  
23 think that we can do a lot of the work that is necessary to do  
24 in this case outside the presence of the Court in a way that  
25 would streamline these proceedings.

1           With regard to the discovery requests, I don't know  
2   if you want me to go through each of these requests. I do  
3   think that we're entitled to them. We're entitled to  
4   discovery if good cause is shown. I believe that we have  
5   shown good cause for each of our requests.

6           All we're asking for is six months to complete  
7   discovery plus 21 days to file the amendment. If the Court  
8   were to look at just a smattering, just pick any 2255 capital  
9   case, what you will see is repeated amendments. You know,  
10   you've got to seek permission of the Court, of course, but  
11   there are repeated amendments, and that is what we are trying  
12   to avoid in this case. We're not trying to do anything to  
13   circumvent the rules. We understand what the rules are. We  
14   think six months to conduct discovery, we file one amendment,  
15   one amendment only, and we move on.

16           I don't think six months is a lot of time to ask  
17   for. There are 62 people currently on federal death row. The  
18   death penalty, the federal death penalty was reinstated  
19   sometime in the early to mid '90s. We've had three executions  
20   since then. The last one was over 13 months ago -- or 13  
21   years ago. I just think that delaying this case so that we  
22   can work it up for the next six months is not an unreasonable  
23   request. I think it in fact will make this case more  
24   streamlined, will go more smoothly, and we will not see the  
25   repeated requests to amend that we see in most of the cases.

1 Thank you.

2 THE COURT: So your motion is multifaceted: to  
3 vacate the conviction, to set aside the conviction, or correct  
4 the sentence. Is that right?

5 MS. FOSTER: Yes, Your Honor.

6 THE COURT: Either of those three?

7 MS. FOSTER: Yes.

8 THE COURT: Okay. Anything else?

9 MS. FOSTER: No, thank you.

10 THE COURT: Thank you. Thank you. Thank you. Very  
11 good. Very good.

12 Ms. McManus, would you wish to respond?

13 MS. McMANUS: Thank you, Your Honor.

14 To a large degree we actually agree with Ms. Foster  
15 at least in the sense that we likewise would like an orderly  
16 and efficient process to bring this motion to resolution. We  
17 just disagree about, you know, how to get there, and the Court  
18 will, of course, have to decide what the best method is.

19 From our perspective the rules are all set up with  
20 the idea in mind that the claims are set out and that's the  
21 opening salvo, and the defendant is required to set forth in  
22 the initial motion and certainly in any amended motion that's  
23 filed specific allegations of fact that would lead the Court  
24 to believe that federal habeas relief is appropriate, and that  
25 discovery is only appropriate and an evidentiary hearing is

1 only appropriate to the extent that further factual support  
2 would lead the Court to that conclusion. And for the reasons  
3 that we set out in our response, we do not believe that  
4 Gabrion's current counsel has met that burden at this time.

5 In fact, what we've just been listening to almost  
6 sounds like an argument on the motion, the substantive motion,  
7 but we haven't seen a lot of the support that already has been  
8 gathered, the hundred-plus-page social history report, the  
9 supposed information from experts, nothing. We haven't seen  
10 it and they've already pulled all that together. So it's our  
11 position that that should be filed if they're going to file it  
12 in connection with an amended claim, an amended motion, sooner  
13 rather than later to get the ball rolling to determine then --  
14 to whittle those claims down.

15 There's over 50 claims that have been asserted. The  
16 claims range in subject matter. A few of them have been  
17 highlighted here today, but none of them have been supported.  
18 For example, there's no mental health professional who's  
19 provided an affidavit that would lead this Court to believe  
20 that there's any reason that habeas relief would be  
21 appropriate. Until that happens, we really aren't in a  
22 position to talk about the merits or to talk about whether  
23 discovery -- further discovery is needed.

24 As of now it's our position that all of the claims  
25 can be resolved without further evidentiary development, and

1 so we respectfully request that the Court consider proceeding  
2 in that fashion; that is, setting a time for the filing of any  
3 amended motion, a time, a deadline for the government to  
4 provide any supplemental response, and then take up at that  
5 time whether there are any claims that have survived that  
6 require further evidentiary development or discovery.

7 I can go through some of the requests if the Court  
8 would like or --

9 THE COURT: Flesh them out a little bit so I  
10 don't -- you're very conclusory, and maybe that's the way you  
11 have to argue, but flesh it out a little bit so I see where  
12 you're coming from.

13 MS. McMANUS: Okay. So, for example, some of the --  
14 we've talked -- heard a lot about, as I said, the mental  
15 health. We've heard, I think I heard that there might have  
16 been some experts that they've been consulting with that might  
17 have provided some information that would lead to some  
18 question about whether additional mental health evidence, were  
19 it before the Court, would suggest that habeas relief is  
20 appropriate.

21 As it stands now, we have the testimony and we have  
22 eight mental health professionals having provided an opinion  
23 that Gabrion was not mentally ill at the time of trial, and  
24 there's nothing in the record to suggest otherwise. So until  
25 there's some sort of claim or some affidavit supporting the

1 notion that there's some question about that, then we would  
2 suggest that discovery is not appropriate.

3 As to some of the specific claims, you know, the  
4 requests are -- some of the requests are wholly untethered to  
5 any specific claim. For example, they'd like to depose Dr.  
6 Cohle, the forensic pathologist. The reason given is that  
7 information has come to light that might impact his opinions,  
8 but there's no information given to the Court or to us as to  
9 what that information would be or how it might impact his  
10 opinions. And before we have a dep -- before they're entitled  
11 to depose a witness, they have to show good cause. They have  
12 to show this Court good cause to believe that there's some  
13 reason to believe that Mr. Gabrion would be entitled to habeas  
14 relief.

15 THE COURT: So you're saying that good cause should  
16 be tethered to some factual historical background piece of  
17 evidence?

18 MS. McMANUS: That's correct, Your Honor. I think  
19 the cases say, and all the cases are different because they  
20 arise in different contexts, but all the cases say that the  
21 good cause standard requires that there be specific  
22 allegations that would lead the Court to believe that federal  
23 habeas relief is appropriate if further facts are developed.

24 Now, in our response to the 2255 motion we've  
25 explained why all of the claims that have been asserted to

1 date can be resolved without further factual development; for  
2 example, the ineffective assistance of counsel claims. We  
3 have alleged there's not a showing of prejudice as to all of  
4 those claims.

5           So unless there can -- there is a showing that there  
6 is good cause, that there are specific -- for example, if this  
7 was a case where no mental health evidence had been presented  
8 at trial or during the penalty phase and then habeas counsel  
9 consulted with a mental health professional and provided an  
10 affidavit that says there appears to be, you know, serious  
11 mental illness present in this defendant and counsel and I  
12 believe it would have -- it would have been present at the  
13 time this case was tried and none of that was presented, then  
14 there might be an issue there about whether there needs to be  
15 some further development of that issue to present it to the  
16 Court. Here we have, you know, a vast record of review of Mr.  
17 Gabrion's mental health, three competency examinations,  
18 additional witnesses who testified at trial, and we have  
19 nothing from the other side to suggest to undermine any of  
20 those conclusions.

21           If you go through the other requests, many of them  
22 do seem like they're designed -- they fall in that category of  
23 a fishing expedition. So, you know, just to take a couple of  
24 examples, I don't know that the Court wants me to go through  
25 all of them, but request number 8 is all evidence in the

1 government's possession regarding the whereabouts of Shannon  
2 VerHage, Rachel Timmerman's baby who disappeared, and of  
3 course it's our theory that Mr. Gabrion murdered her. There's  
4 no -- there's no tethering to a claim as to, you know, what  
5 they think might exist, how that might lead one to believe  
6 that Mr. Gabrion's entitled to habeas relief.

7 Another, request number 17, is any information  
8 identifying Matt Singerman, who withdrew Mr. Gabrion's Newaygo  
9 County Court file in the case charging Mr. Gabrion with CSC  
10 involving Rachel Timmerman. But I don't know who Matt  
11 Singerman is. I don't know -- and it would be unduly  
12 burdensome to require the government to go through all of its  
13 files or to try to otherwise figure out who this individual is  
14 when there's no showing as to how that would bear on Mr.  
15 Gabrion's claims for relief.

16 THE COURT: Thank you.

17 MS. McMANUS: Thank you.

18 THE COURT: Thank you. Thank you.

19 Response, Ms. Foster?

20 MS. FOSTER: Just very briefly, Your Honor.

21 I think there's no question that if we engage in  
22 discovery, we're going to find facts that support the claims  
23 that we have pled. If we didn't, this would be the first case  
24 in my 33 years practicing law that that would be true.

25 But to address the government's specific claims,



1 when the government says that we've got eight mental health  
2 professionals who have said that Mr. Gabrion is not mentally  
3 ill, the foundation for a proper mental health examination,  
4 and I think even the government's experts might say this and  
5 this is part of why we'd like to depose them, is that they  
6 need to know a proper social history of the defendant. Mental  
7 health professionals are very, very interested in knowing  
8 whether other members of the family suffer from major mental  
9 illness. I really think that the government's experts would  
10 even agree with that.

11 THE COURT: Is it your position that there was  
12 nothing on the record on that?

13 MS. FOSTER: Nine pages was their full social  
14 history, and it is our position that there was zero with --  
15 zero regarding family mental illness. Zero. Nothing. They  
16 had no idea. In fact, one of their experts asked them does  
17 the defendant have a history of bipolar in his family, and  
18 their response was we have not uncovered any evidence that  
19 would indicate that that was true. Mr. Gabrion's family,  
20 extended family is so remarkably mentally ill.

21 THE COURT: Oh, I -- pardon the years that have gone  
22 by since I tried it, but wasn't there a considerable amount of  
23 testimony at the trial that related to that, family members  
24 that took the witness stand and testimony about the  
25 contentious home he grew up in?

1 MS. FOSTER: Yes, Your Honor. There was testimony  
2 with regard to family dysfunction. There was some testimony  
3 with regard to abuse. But none of that was tied to mental  
4 illness. In fact, many members of Mr. Gabrion's family have  
5 been committed for inpatient treatment and many, many of them  
6 have been diagnosed with major mental illness.

7 With regard to the fact development that the  
8 government responded to with regard to Paragraph 8 where we  
9 seek discovery of evidence in the government's possession  
10 regarding the whereabouts of Shannon VerHage, Rachel  
11 Timmerman's infant child, the Court will see that we have  
12 tethered that to a claim, specifically claim 4-G, where we  
13 allege that counsel was ineffective for failing to object to  
14 inadmissible and prejudicial testimony and argument at the  
15 penalty phase that would specifically go to Ms. -- to the  
16 infant.

17 I would also refer the Court to ground 4-Q where we  
18 allege counsel ineffective for failure to -- specifically for  
19 failure to investigate evidence that Shannon was still alive.  
20 There's news articles from August 8th of 1997 where Mr.  
21 Timmerman, Rachel Timmerman, the victim in this case, her  
22 father said that he believed that the child was still alive.  
23 Chrystal Roach --

24 THE COURT: He hoped they were alive, didn't he  
25 say?

1 MS. FOSTER: He believed that -- I've got more. He  
2 said he believed that she was still alive, and if that was all  
3 there was, then maybe you could just write that off to wishful  
4 thinking on behalf of a grieving family member. But Ms. Roach  
5 is also quoted in the paper saying that the government has  
6 evidence that she's still alive.

7 Detective Miller was quoted in this news article of  
8 August 8, 1997, saying, quote, "They believe people know the  
9 whereabouts of Shannon." The newspaper article indicated  
10 that, quote, "Investigators have evidence the baby was still  
11 alive after the mother was killed." So that is not a fishing  
12 expedition.

13 With regard to Paragraph 17, disclosure of  
14 information identifying Matt Singerman, if the government  
15 doesn't know who he is, the government doesn't know who he  
16 is. What we were searching there, that request supports our  
17 claim 1-A and would show that the government was aware if  
18 Mr. -- we suspected that Mr. Singerman might be an agent with  
19 the FBI. If he was, it would support our claim 1-A and would  
20 show that the government was aware of Roach's false testimony  
21 because Mr. Singerman -- what we're interested in is Mr.  
22 Singerman checked out or had access to that state court rape  
23 case, the docket, the file itself, and what we were interested  
24 in knowing is if Mr. Singerman was working on behalf of the  
25 government. So that's what that claim is tied to.

1           In short, I would just say that -- you know, I'd  
2           just reiterate that further discovery, taking depositions and  
3           things like that are going to produce more facts than we  
4           currently know to support the claims that are already pled.  
5           Again, we understand what the amendment rules are. We  
6           understand that we can't come forward with completely new  
7           claims. But we are permitted to come forward with facts that  
8           support the claims that we've pled.

9           In the event that the Court is not inclined to grant  
10          our request for the six months' discovery and the amendment to  
11          follow, we would request at least 60 days to amend this  
12          petition with the information that we currently have in our  
13          possession. Thank you.

14          THE COURT: Thank you. Thank you. Thank you, both  
15          of you. Not only has this been interesting, you've both done  
16          a fine job of arguing, but you've uncovered some memories back  
17          there that I thought I'd forgotten about completely.

18          MS. FOSTER: You probably preferred that, actually.

19          THE COURT: Anyway, you've done a fine job, both of  
20          you, and you've presented me with something. I've gone  
21          through this and I have a lot of questions on my own, some of  
22          which you've answered for me here, but I will spend some more  
23          time on this and I'll get back with you.

24          Thank you so much. Thank you.

25          MS. FOSTER: Thank you, Your Honor.

1 MS. McMANUS: Thank you.

2 (Proceedings concluded at 4:06 p.m.)

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4 \* \* \*

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6 CERTIFICATE OF REPORTER

7  
8 I, Kevin W. Gaugier, Official Court Reporter for the  
9 United States District Court for the Western District of  
10 Michigan, appointed pursuant to the provisions of Title 28,  
11 United States Code, Section 753, do hereby certify that the  
12 foregoing is a true and correct transcript of the proceedings  
13 had in the within-entitled and numbered cause on the date  
14 hereinbefore set forth.

15 I do further certify that the foregoing transcript  
16 was prepared by me.

17  
18  
19  
20 /s/ Kevin W. Gaugier

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